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In The

Supreme Court of the United States

October Term, 1975

No. 75-420

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY, ET AL.,
Appellees.

On Appeal From The United States District Court
For The Eastern District of Virginia

SUPPLEMENTAL BRIEF FOR APPELLEES

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I.

NEWLY ENACTED LEGISLATION

This Supplemental Brief is filed pursuant to Rule 41(5), Rules of the Supreme Court of the United States, to invite the Court's attention to the newly enacted Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. No. 94-210, 90 Stat. 31 *et seq.*), signed February 5, 1976. This makes inapplicable to rail carriers the sections relied

on by appellants to support their argument of implied power and substitutes new provisions as follows:

1. By Section 205, the former Section 15a(2) of the Interstate Commerce Act becomes inapplicable and there is substituted a new Section 15a(4) as follows:

> "(4) With respect to common carriers by railroad, the Commission shall, within 24 months after the date of enactment of this paragraph, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels. No rate of a common carrier by railroad shall be held up to a particular level to protect the traffic of any other carrier or mode of transportation, unless the Commission finds that such rate reduces or would reduce the going concern value of the carrier charging the rate."

2. By Section 202(e), the former Section 15(7) of the Interstate Commerce Act becomes inapplicable and new provisions are substituted as Section 15(8) reproduced in Appendix A hereto.

II.

ARGUMENT

The new Section 15a(4) makes it clear in terms that the Commission's ratemaking power exists only "for the establishment of revenue levels" adequate for the realization of stated policies. The Commission concedes in its Brief that this provides no explicit answer to the question whether the Commission has the power to impose conditions on the use to which carriers may put the revenues they collect (CB 37 n. 27). More than that, the new Act makes it unmistakably clear that, howsoever broad the policies to be considered by the Commission in the exercise of its ratemaking power, the power itself exists only "for the establishment of revenue levels" and does not reach beyond that point to ordering the disposition to be made of revenues that have been collected.

The changes made by Section 15(8) suggest the attenuation of the suspension power rather than any enlargement of it. For example, whereas under the former Section 15(7) the Commission could suspend for seven months a freight rate increase while it investigated the reasonableness of that increase, under the new Section 15(8)(b), the Commission may suspend a freight rate increase of seven percent or less on individual commodities only if it first finds a violation of Sections 2, 3 or 4 or that the carrier has "market dominance." Likewise, the Commission may now suspend a rate decrease only if it finds a violation of Sections 2, 3 or 4 or that the change "constitutes a competitive practice which is unfair, destructive, predatory or otherwise undermines competition which is necessary in the public interest." This narrowing of the suspension power hardly furnishes any basis for the implication of the power to impose the challenged conditions.

Significantly, in this broad and sweeping revision of the Interstate Commerce Act, Congress has again failed to grant the Commission the power it here asserts. In short, neither the new Act nor its predecessor grants to the Commission the power it seeks to exercise, nor does either furnish a basis for the implication of such a novel power.

For these additional reasons, we urge that the decision of the district court be affirmed.[1]

Respectfully submitted,

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[1] It is beyond dispute that "the prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams*, 397 U.S. 471, 475 n. 6 (1970). This includes newly enacted legislation. *Hall* v. *Beale*, 396 U.S. 45, 48 (1968).

APPENDIX A

(e) Section 15 of the Interstate Commerce Act (49 U.S.C. 15), as amended by this Act, is further amended—

(1) by adding at the end of paragraph (7) thereof the following new sentence: "This paragraph shall not apply to common carriers by railroad subject to this part."; and

(2) by inserting a new paragraph (8) as follows:

"(8)(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the Commission

if, upon complaint of an interested party, the Commission finds it to be unlawful.

"(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:

"(i) in the case of a rate increase, a rate may not be suspended on the ground that it exceeds a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part or, following promulgation of standards and procedures under section 1(5)(d) of this part, if the carrier is found to have market dominance, within the meaning of section 1(5)(c)(i) of this part, over the service to which such rate increase applies; or

"(ii) in the case of a rate decrease, a rate may not be suspended on the ground that it is below a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part, or for the purposes of investigating such rate change upon a complaint that such rate change constitutes a competitive practice which is unfair, destructive, predatory or otherwise undermines competition which is necessary in the public interest.

"(c) The limitations upon the Commission's power to suspend rate changes set forth in subdivisions (b) (i) and (ii) apply only to rate changes which are not of general

applicability to all or substantially all classes of traffic and only if—

"(i) the rate increase or decrease is filed within 2 years after the date of the enactment of this subdivision;

"(ii) the common carrier by railroad notifies the Commission that it wishes to have the rate considered pursuant to this subdivision;

"(iii) the aggregate of increases or decreases in any rate filed pursuant to clauses (i) and (ii) of this subdivision within the first 365 days following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1976; and

"(iv) the aggregate of the increases or decreases for any rate filed pursuant to clauses (i) and (ii) of this subdivision within the second 365 day-period following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1977.

"(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

"(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complainant; and

"(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease

in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

"(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involved to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision (a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate, fare, or charge found to be not justified, plus interest at a rate which is equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

"(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commis-

sion shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse effect (in violation of section 2 or 3 of this part) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time."